Under section 417 of the Criminal Procedure Code there is no doubt that the High Court has an absolute discretion to grant bail in any case, and this matter being before me on review I thought it proper to consider whether this was a case in which the High Court ought to grant bail. Again, following the case of *Re K. S. Menon*[1], I was of opinion that in cases punishable with death and in cases punishable with penal servitude for life the High Court ought not to grant bail, except for exceptional and very special reasons. I could see no such exceptional or special reasons in the present case.

It was suggested on behalf of the defence that the accused was being and would be held in custody whilst the Police searched for the two missing men alleged to have been in the back of the car. The Deputy Public Prosecutor assured me that this was not so, and pointed out that a very large number of witnesses had already had statements taken from them, some as far away as Kuala Lumpur, and that further statements were still being taken and that any delay there might be in the investigation of the case was in no way concerned with the question of finding the other two men, and I accepted this assurance.

If by reason of delays in the investigation of the case by the Police inordinate delay is caused, then this might become an exceptional or special reason for the High Court to grant bail even in a serious case of this kind, but in my opinion there is no ground at the present stage for suggesting that there has been or will be undue delay.

I observe that in the recent case of *In re Lim Peng Koi*[2], the report of which had not been received when the argument in the present case took place before me, bail was granted by a Magistrate in Singapore in a case of gang robbery. It does not appear from the report, however, in what circumstances bail was granted; nor is it clear to what extent the point was raised at the hearing of the application for *habeas corpus* that bail ought not to have been granted. The learned Judge in his judgment says: "The Magistrate after hearing all parties thought fit to allow bail in $10,000 and I should not feel disposed to alter his decision in that regard, even if I had power to do so". There may have been grounds in that case for doubt as to whether the accused had committed the offence charged and in such circumstances the High Court would, of course, not lightly interfere with the exercise of discretion by the Magistrate. As to this Court having power to alter a Magistrate's decision as to bail, although the High Court in Singapore has the same powers of revision under section 322 of the Criminal Procedure Code as this Court has, it has not, as far as I am aware, the wide powers conferred upon the High Court of the Federation by section 57 of the Courts Ordinance, 1948. I have no doubt that I have power to alter the Magistrate's decision as to bail where the decision is not based upon a correct exercise of discretion, and I do not think the Singapore decision is an authority in any way contrary to the views I have formed in the present case.

For the above reasons I set aside the Magistrate's Order releasing the accused on bail and substituted therefor an Order remanding the accused in custody for one week from 27th March, 1952.

Order accordingly.

V. KANDIAH v. THE GOVERNMENT OF THE FEDERATION OF MALAYA.

[Orig. Civ. Juris. (Wilson, J.) April 24, 1952]

[K.L. — Civil Suit No. 216 of 1951]

Damages — Claim for wages and damages for wrongful dismissal — Frustration of contract.

The plaintiff was a postal clerk in the Postal Department of the Government of the Federated Malay States. On the occupation of Malaya by Japanese Forces he joined the Postal Department administered by the Japanese. Subsequently he went to India as a member and volunteer in the Indian National Army. After the Liberation of Malaya he applied to the British Military Administration for reinstatement in the Postal Department. After considerable delay he was informed that he was dismissed from the service and would not be reinstated.

Held, his contract of service with the Government of the Federated Malay States was terminated by reason of frustration by reason of the occupation of Malaya by the Japanese Forces.

Cases referred to :—

(1) *Unger v. Preston Corporation* (1942) 1 All E.R. 200.

(2) *Constantine (Joseph) Steamship Line, Ltd. v. Imperial Smelting Corpn., Ltd., The Kingswood* (1941) 2 All E.R. 165.

(3) *Nordman v. Rayner & Sturges* (1916) 33 T.L.R. 87.

(4) *Marshall v. Glanvill* (1917) 2 K.B. 87.

CLAIM FOR DAMAGES.

K. L. Devaser for the plaintiff.

D. M. K. Grant (Federal Counsel) for the defendants.

Cur. Adv. Vult.

Wilson, J. : — The plaintiff was appointed a probationary clerk in the Postal Department of the Government of the Federated Malay States on the 13th January, 1927. He was placed on the pensionable establishment on the 1st January, 1940. The last entry appearing in his record of service is the 1st June, 1941 at which time his salary was $130 per mensem. After the occupation of Malaya by the Japanese Forces the plaintiff remained in Malaya, and shortly after the occupation he sought and obtained employment from the Japanese authorities in the Postal Department administered by them. After about two years he went to India, in circumstances to which I shall refer later. After the Liberation, plaintiff applied to the Chief Secretary, Ceylon, for permission to return to Malaya. He received a reply informing him that he should make his application direct to the Chief Civil Affairs Officer, B.M.A. Malaya, and he accordingly wrote to that officer a letter dated the 4th April, 1946 in which he asked for permission to return to Malaya and to be reinstated in his previous post or be allowed to retire. This letter was duly acknowledged by a letter dated the 6th May, 1946, and after further correspondence he was eventually informed by the Deputy Chief Secretary, in a letter dated 28th January, 1949, "You are dismissed from the service and will not be reinstated."

In these circumstances he claims salary from the 22nd December, 1945 to January, 1949 and $5,000 for wrongful dismissal. The defendants allege that the contract of service entered into between the plaintiff and the Government of the Federated Malay States was brought to an end on the 15th February, 1942 by the occupation of Malaya by the Japanese. If that contention succeeds, that is the end of this case. If frustration took place, in law it is immaterial that the defendants purported to dismiss the plaintiff from the service on the 28th January, 1949. If there was frustration the letter of dismissal was superfluous, although it would have to be regarded as somewhat unfortunate and misleading. Various cases have been cited to me and in particular the case of *Unger v. Preston Corporation*[1], in which the law is fully discussed with reference to a number of other decided cases. The headnote to that case is as follows :—

"The plaintiff, who was a refugee from Germany, was engaged by the defendants before the outbreak of war as a full-time school medical officer. In June, 1940, he was interned as an enemy alien, and was not released until March, 1951. In reply to a claim by the plaintiff for payment of his salary during the period he was interned, the defendants contended that, according to the doctrine of frustration, his contract of employment had been automatically terminated on his internment:—

Held, the contract between the parties had been frustrated, and, therefore, the plaintiff's engagement terminated on his internment."

This seems to be a concise and accurate summary of the facts and the decision. It is to be noted that the plaintiff was interned as an enemy alien for a period of nine months only, whereas the Japanese were in occupation of Malaya for over three-and-a-half years. Cassels, J., quoting Viscount Simon, L.C., in *Constantine (Joseph) Steamship Line, Ltd., v. Imperial Smelting Corpn., Ltd., The Kingswood*[2] said as follows :—

".....when 'frustration' in the legal sense occurs, it does not merely provide one party with a defence in an action by the other. It kills the contract itself and discharges both parties automatically."

He further quotes Viscount Simon, L.C., as saying :—

"Whether the contract is terminated or not depends on its terms and surrounding circumstances in each case."

In the case of *Nordman v. Rayner & Sturges*[3], the plaintiff, a German, was under contract with the defendants when war broke out in 1914 and was interned for one month. McCardie, J., held : — "the internment for one month was not sufficient to cause a substantial frustration of the business engagement."

In *Marshall v. Glanvill*[4], McCardie, J., explained his decision in *Nordman v. Rayner & Sturges*[3] by saying that the internment was merely temporary, and that, upon the special facts, it was doubtful from first to last whether it would last for any substantial period. In this latter case McCardie, J., stated in his judgment :—

"A state of war is assumed to be of such prolonged duration as **prima facie** to put an end to contracts which are conditional upon the continuance of a particular state of things which is only consistent with peace."

It is quite clear in this case that the occupation of Malaya by the Japanese Forces rendered impossible for either the plaintiff or the defendants to carry out the terms of the contract during the continuance of the occupation. In my view the contract between the plaintiff and the defendants was terminated by reason of frustration by the occupation of the Federated Malay States by the Japanese and I so hold. For these reasons the action must be dismissed with costs but in case I should be held by another Court to be wrong on the point of frustration, I desire to make a few further observations.

The plaintiff, in his letter of the 4th April, 1946 stated, *inter alia*, as follows :—

"(c) That I served the Japanese for two years in the same department (Postal) and resigned to volunteer for the Indian National Army.

"(d) That my objects in so doing was for India's freedom and my freedom (domestic) too.

"(e) That I came into India in 1943 equipped for underground activities and fell into the hands of law after a short while and detained in Delhi till the end of war."

In cross-examination he stated that when he went to India he held a British passport although he did not take it with him. He stated that he never worked against the British Government but nevertheless that he was sent to India in a Japanese submarine for the purpose of undertaking underground activities in India for the independence of India and that he was equipped for such activities against the Government of India. Having landed surreptitiously in India he did not report to the British authorities. Subsequently, he was interned and there is no evidence to show what he had been doing in India in the meantime. In these circumstances I find that when the defendants became aware of the activities of the plaintiff during the war they were entitled to dismiss him summarily, and therefore, even if I am wrong in regard to the question of frustration, I should dismiss his claim for damages for wrongful dismissal. At the same time, if there was no frustration, his dismissal did not take place until January, 1949, and I would hold that in those circumstances he would be entitled to salary for the period of April, 1946 to January, 1949. There is no evidence before me on which I could accurately assess the amount of salary which would be due to him in the event of there having been no frustration of the contract and I should find it necessary to refer the matter to the Registrar to hold an enquiry as to the amount which would be due.

Judgment accordingly.

CHIN CHAM SEN v. FOO CHEE SANG & ANOR.

[App. Civ. Juris. (Thomson, J.) April 28, 1952]

[Ipoh — Civil Application No. 48 of 1951]

Costs — Getting up fee — Discretion of the taxing officer — Principles by which the taxing officer should be guided — 1932 Rule No. 4 item 86.

In allowing the amount for getting up fee the taxing officer should be chiefly guided by the amount at stake and the importance of the issue involved.

Cases referred to:—

(1) *A. M. M. Murugappa Chettiar v. S. Seenivasagam Chettiar* (1940) M.L.J. 108; (1939) F.M.S.L.R. 121.

(2) *Malayan Trading Co. & Anor. v. Lee Pak Yin* (1941) M.L.J. 207; (1940) F.M.S.L.R. 308.

(3) *In the Estate of Ogilvie* (1910) P. 243.

(4) *Corbett v. Ipoh Tin Dredging Ltd.* (1936) M.L.J 278; (1936) F.M.S.L.R. 160.

(5) *Re Kana Moona Syed Abubakar decd.* (1940) M.L.J. 4.

(6) *Beavis v. Foo Chee Fong* (1938) M.L.J. 129.

(7) *Slingsby v. Attorney-General* (1918) P. 236 at 239.

APPEAL against the decision of the Taxing Master.

S. P. Seenivasagam for the applicant.

B. K. Das for the respondents.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson, J. : — This is an appeal against the decision of the Senior Assistant Registrar allowing certain costs on taxation to the present respondent.

Some time ago, the respondent applied to the Rent Assessment Board for permission to eject the appellant from certain premises, the monthly rental of which was $50. That application was successful. The appellant being dissatisfied with the decision of the Board, took steps to have it quashed by way of *certiorari*. To that end he commenced proceedings by notice of motion dated 3rd December, 1951. The matter was set down for hearing on 14th January, 1952, but on 27th December, 1951, the appellant's solicitors informed the respondent's solicitors that they would not be proceeding further in the matter and that the application for *certiorari* would be withdrawn when it came on for hearing on 14th January. The application was duly withdrawn and the appellant was ordered to pay the respondent's taxed costs.

In due course the respondent's solicitors brought in for taxation their Bill of Costs which without the addition of the percentage increases amounted to $693. The largest item, and the only one with which I am concerned here, was a getting up fee under item 86 of $600. The taxation took place before the Senior Assistant Registrar and in addition to two trifling deductions with which I am not here concerned he taxed off $200 from the fee claimed under item 86 allowing that fee at $400 and the total amount of profit costs at $466. The percentage increases of 25 per centum and 50 per centum and the disbursements were then